19-1204

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FRANK HEINDEL; PHIL P. LEVENTIS,

Plaintiffs-Appellants,

—v.—

MARCI ANDINO, Executive Director of the South Carolina State Election Commission, in her official capacity; JOHN WELLS, Chair of the South Carolina State Election Commission, in his official capacity; CLIFFORD J. ELDER, AMANDA LOVEDAY, SCOTT MOSELY, Members of the South Carolina State Election Commission, in their official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT COLUMBIA

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

Defendants' response brief makes two critical errors of law: it misstates the legal standard for determining whether an injury is imminent for purposes of standing, and it asks the court to ignore well pled allegations and instead credit factual assertions presented for the first time in their appellate brief.

First, Defendants misstate the legal standard for an imminent injury sufficient to establish standing at the pleading stage. The Supreme Court has made clear that there are two potential routes to establishing the imminence of a prospective harm: a future injury may be (1) certain but not yet manifest ("certainly impending"), ***or*** (2) uncertain but sufficiently likely to materialize ("substantial risk"). Defendants erase the "substantial risk" route, wrongly claiming that plaintiffs must show a certainly impending future injury. They do this by devoting the bulk of their substantive argument to the contours of the "certainly impending" standard, and then by arguing that "satisfying the 'substantial risk' standard is impossible when a plaintiff's alleged harm is not 'certainly impending.'" Defs.' Br. 30. Their argument conflicts with controlling legal precedent. The Supreme Court has made clear that these are two distinct standards, and both this Circuit and other lower courts have repeatedly applied this precedent, finding plaintiffs to have standing in cases involving a substantial, but uncertain, risk of future injury.

Second, Defendants ask this Court to ignore well pled allegations and disregard the plausible inferences following from those allegations, and instead to resolve a motion to dismiss based on outside-the-complaint factual assertions raised for the first time in their appellate brief. At the same time, Defendants brush aside detailed factual allegations illustrating the profound vulnerabilities of the voting system challenged in this litigation. Those allegations describe the prior successful efforts of researchers to breach that system, the numerous interlocking security deficiencies offering pathways to attack, the structural incapacity of the system to reliably detect or remedy breaches, the years of voting machine failure leading to lost votes, and the repeated warnings by national security leaders that the kind of system used in South Carolina is a prominent target of sophisticated attackers. When these detailed factual allegations are evaluated under the correct legal standard, Plaintiffs easily carry their pleading burden with respect to standing.

I. Defendants Misstate the Relevant Legal Standards for Article III Standing

Defendants advance three overarching legal positions that are incorrect. First, Defendants erroneously suggest that standing requires a certainty of future harm. That proposition is flatly contradicted by Supreme Court precedent, and irreconcilable with numerous cases. Voting rights cases in particular illustrate the principle that plaintiffs facing a substantial risk of not having their votes counted have standing to sue. Second, Defendants advance a theory of "generalized

grievances" that depends on the notion that multiplying an injury robs it of its concreteness. This, again, is inconsistent with longstanding case law. Third, Defendants assert that Plaintiffs' injury is not caused by them, and cannot be remedied by this Court, because if South Carolina's voting system fails to count Plaintiffs' votes as the result of a hack it will involve a "third party" hacker. This contention is inconsistent with Defendants' exclusive authority to certify voting systems that are sufficiently reliable and secure (and to de-certify them when they are not).

A. Defendants Explicitly Collapse the "Substantial Risk" Standard into the Distinct "Certainly Impending" Standard and Cannot Account for Case Law Involving Uncertain but Substantial Risk of Injury

The Supreme Court has held that plaintiffs faced with a risk of future harm can come to federal courts for relief when that injury is "'certainly impending,' ***or*** there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (emphasis added)). Defendants acknowledge, as they must, that a "'substantial risk' of future harm could suffice to show an imminent injury-in-fact." Defs.' Br. 29. But they then immediately erase the distinction between "substantial risk" and "certainly impending" by proclaiming that "satisfying the 'substantial risk' standard is impossible when a plaintiff's alleged harm is not 'certainly impending.'" *Id.* at 30. *See also id.* at 42.

The Supreme Court has made clear that prospective harm may be imminent because it is certain to occur; alternatively, it may be imminent *even where it is uncertain to occur* if a plaintiff faces a substantial risk that it will come to pass. *Driehaus*, 573 U.S. at 158. Finding standing based on substantial (but uncertain) risk of injury is especially well established—and especially vital—in the voting rights context. When a voter faces a substantial risk of disenfranchisement, the prospective harm is especially profound. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). At the same time, the nature of voting and elections means that it may never be possible to know with certainty which voters suffer a harm—especially when the harm is a failure to count secret ballots—and impossible to remedy after the fact. *See Stewart v. Blackwell*, 444 F.3d 843, 855 (6th Cir. 2006), *vac'd as moot following vote for en banc review by* 473 F.3d 692 (6th Cir. 2007) (finding standing where "plaintiffs are unable to articulate which voter will be harmed in the future by deficient equipment"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 230 (4th Cir. 2014) (preliminarily enjoining new election procedures based on risk that some voters would be injured); *N.C. State Conference of NAACP v. N.C. State Bd. Of Elections*, 283 F. Supp. 3d 393, 403–04 (M.D.N.C. 2017) (finding

plaintiff established standing by demonstrating a "substantial risk" that he would be unlawfully purged from voter rolls in future elections).

For those reasons, courts generally have found that voters have standing to challenge election policies and procedures when they plausibly allege a substantial risk of deprivation of their right to vote, even though there is no way to predict with certainty that their specific votes will be affected. *See* Opening Br. 21–25. In light of that case law, and as described at length in Plaintiffs' opening brief, Plaintiffs have alleged facts sufficient to plausibly establish a substantial risk that their votes will go uncounted.

Defendants fail to distinguish the cases finding injury based on a substantial risk of harm. First, Defendants contend that the standing analysis depends on whether a plaintiff challenges "black-and-white government policies" rather than "an inanimate object" such as a voting machine. Defs.' Br. 32. This argument is misguided. First, it is clear that a voter-plaintiff will have standing to challenge the constitutionality of a deficient voting system, as numerous cases have established. *See, e.g.*, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008); *Stewart*, 444 F.3d at 854; *Black v. McGuffage*, 209 F. Supp. 2d 889, 894–95 (N.D. Ill. 2002). Moreover, Plaintiffs are not challenging an "inanimate object" that is somehow untethered to any "black-and-white government policy." Rather, as the Cause of Action in the Complaint states, they are they are challenging Defendants'

"fail[ure] to approve and adopt a voting system that meets reasonable security standards" despite having the statutory authority and duty to do so. *See* JA55 ¶¶ 118–21. Those certification decisions, structured by South Carolina's statutory framework, certainly represent "black-and-white government policies."

Defendants also attempt to distinguish the cases cited in Plaintiffs' opening brief illustrating that voters have standing to challenge election procedures when they face a substantial risk of disenfranchisement. Defs.' Br. 33–35.[1] Those putative distinctions miss the mark. For example, Defendants purport to distinguish several of the cases cited in Plaintiffs' brief on the ground that those cases involved past harm. Yet none of those cases states that prior injury is a necessary component of assessing future risk. Indeed, as Defendants acknowledge in a footnote, in one of those cases, *Stewart v. Blackwell*, the court explicitly recognized that "standing does not depend on any injury suffered in a previous election." Defs.' Br. 34 n.12 (citing *Stewart*, 444 F.3d at 848, 855 [sic]). Defendants omit the end of the relevant sentence, which states in full: "Furthermore, the plaintiffs' standing does not depend on any injury suffered in the previous election, but rather on the probability that their votes will be miscounted in upcoming elections." *Stewart*, 444 F.3d at 854. And indeed, the core of *Stewart*'s standing analysis was the premise that "this Court and

[1] Defendants purport to distinguish *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014); *Stewart*, 444 F.3d 843; *Black*, 209 F. Supp. 2d 889; and *N.C. State Conference of NAACP*, 283 F. Supp. 3d 393.

others have recognized that voters can have standing based on an increased risk that their votes will be improperly discounted." *Id.*

Similarly, in *Arcia v. Florida Secretary of State*, voters challenging a policy to purge voter rolls had standing to seek prospective relief. In a prior election the plaintiffs had been wrongly identified as non-citizens, but not prevented from voting. 772 F.3d at 1341. That prior misidentification provided no certainty that they would be wrongfully excluded in the future, and the court did not rely on it in evaluating standing to challenge the upcoming election prospectively. Instead, the court held that "probabilistic harm is enough" where the plaintiffs faced a "realistic probability that they would be misidentified due to unintentional mistakes on the Secretary [of State's] data-matching process." *Id.* So, too, in *Black v. McGuffage*, voters subject to error-prone voting machines had standing to pursue their constitutional challenge, because "probabilistic injury is enough" to confer standing in this context. 209 F. Supp. 2d at 894–95. The court also noted the importance of that principle in challenging a deficient voting system: "Because the voting process is anonymous, it is impossible for any one voter to know with more certainty that their intended votes were not counted." *Id.* at 895. Imposing a certainty requirement would insulate from review even "a policy under which every tenth ballot was systematically discarded instead of counted." *Id.* And in *N.C. State Conference of NAACP*, the court held that a plaintiff challenging a policy for purging voter rolls had standing

even though he had not been "purged from the rolls or prevented from voting" because the policy gave rise to a "substantial risk of future harm." 283 F. Supp. 3d at 403–04.

Curling v. Kemp remains the case closest to this one, and Defendants cannot distinguish it. The *Curling* plaintiffs allege that their right to vote has been compromised by a voting system consisting of DRE machines that have deep security flaws and are not capable of being audited. *See Curling v. Kemp*, 334 F. Supp. 3d 1303, 1308 (N.D. Ga. 2018). Defendants attempt to distinguish *Curling* by stating that the court relied on "two dozen paragraphs in the [*Curling*] complaint referencing specific instances of disenfranchisement to various plaintiffs." Defs.' Br. 34 (citing *Curling*, 334 F. Supp. 3d at 1315–16). This is misleading. The court's lengthy string cite is largely devoted to evidence from computer scientists stating that Georgia's voting system is insecure, has been successfully hacked by computer researchers, and creates a substantial risk that the plaintiffs' votes would not be counted—precisely the type of facts that Plaintiffs here allege—as well as declarations from plaintiffs who describe being forced to choose between the insecure DRE machines and an absentee ballot system that suffers other deficiencies. *See Curling*, 334 F. Supp. 3d at 1314–16. It does not identify voters who had previously been disenfranchised because of a hack or malfunction of the state's

voting machines, the risk that their lawsuit sought *prospectively* to address. *Id.* at 1312–14.

Defendants also suggest that, in *Curling*, the plaintiffs could point to a past "cyber-attack [that] had already occurred and was going to happen again." Defs.' Br. 23. This mischaracterizes the facts of *Curling*. A cybersecurity researcher investigating an election website discovered that he could access sensitive voter information, files from the election management database, and passwords for the voting machines. 334 F. Supp. 3d at 1310. He had no intention of changing votes or otherwise manipulating the voting system; to the contrary, he immediately notified elections officials of the risk. *Id.* This intrusion was not evidence that a previous attack had affected votes (much less the plaintiffs' votes) and would likely recur; rather, it was evidence that the system was deeply *vulnerable* to such an attack. Similarly, in this case, Plaintiffs allege that security researchers had previously exploited vulnerabilities to breach the iVotronic system, and that Defendants have been on notice of those vulnerabilities since at least 2007, but have not remediated the risks. *See* JA32–35 ¶¶ 57–66.[2]

[2] On May 21, 2019, the *Curling* court denied in relevant part the defendants' motion to dismiss the case on the merits. *See Curling v. Raffensperger*, No. 1:17-cv-2989 (N.D. Ga. May 21, 2019) ("*Curling II*"), ECF No. 375 at 53. Though focused on the merits, the court's reasoning is instructive here. *See id.* at 43 ("Defendants' motion arguments completely ignore the reality faced by election officials across the country underscored by Plaintiffs' allegations that electronic voting systems are under unceasing attack.").

Finally, Defendants suggest that there is a dispute over whether *Clapper* is "applicable" to this case. Defs.' Br. 16. They are mistaken. The dispute is not *whether Clapper* applies, but *how* it applies. Insofar as *Clapper* explicates legal principles, it supplies applicable authority. In applying those principles properly, however, the fact that *Clapper* reviewed a summary judgment decision, not a motion to dismiss, is important. While the requirements of Article III standing apply at any stage of the case, how to analyze those requirements varies with the procedural posture. *See Wikimedia Found. v. NSA*, 857 F.3d 193, 208 (4th Cir. 2017). In *Clapper*, the Supreme Court's analysis turned on an assessment of the concreteness of the prospective harm those plaintiffs faced; based on that assessment, the Court concluded that the claims were overly speculative. *See Clapper*, 568 U.S. at 410–13; *see also* Opening Br. 31–34. Because it was reviewing a decision on their motion for summary judgment, the *Clapper* plaintiffs were not entitled to the presumption that well-pleaded facts were true and supported inferences in their favor. *Wikimedia*, 857 F.3d at 208. In this case, on the other hand, Plaintiffs are entitled to exactly those presumptions. This is why it is imperative to not "blur[] the distinct burdens for establishing standing at the motion-to-dismiss and summary-judgment stages of litigation." *Id.* at 212. "[W]hat may perhaps be speculative at summary judgment can be plausible on a motion to dismiss." *Id.*

B. Defendants Equate Widespread Injuries with Generalized Grievances

Defendants contend that Plaintiffs advance a "generalized grievance" because (1) "it is not contested that [Plaintiffs'] injury is 'widely shared,'" and (2) "the injury here lacks concreteness" because, in Defendants' telling, that injury is "based upon [Plaintiffs'] reasonable beliefs." Defs.' Br. 12–14. Both of those premises are unsound.

1. A Widely Shared Injury to Voting Rights is Not a Generalized Grievance

Defendants' argument boils down to the notion that Plaintiffs' asserted injury lacks particularity because all in-person South Carolina voters face the same risk of disenfranchisement. This Court has already rejected the argument that the deprivation of the right to vote is necessarily a "generalized grievance" when many or all voters are injured in the same way. *See Bishop v. Bartlett*, 575 F.3d 419, 424–25 (4th Cir. 2009). The fallacy in Defendants' argument is that it turns entirely on multiplication. After all, there can be no question that an individual's interest in her vote being counted accurately is a concrete, particularized injury. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (stating that the right to vote is "individual and personal in nature"). Defendants ask this Court to hold that such concreteness melts away as the number of voters facing similar injuries multiplies. Such a rule would be a strange one. It is therefore not surprising that the Supreme Court in *Federal*

Election Commission v. Akins, 524 U.S. 11, 24 (1998), explained that a "particularly obvious" situation in which a widely shared injury remains concrete is "where large numbers of voters suffer interference with voting rights conferred by law."

Defendants place heavy weight on *United States v. Richardson*, *see* Defs.' Br. 11 & n.2, 14, but that case does not help them. In *Richardson*, the plaintiff sought to force the government to disclose information about CIA spending. 418 U.S. 166, 168 (1974). He asserted that the Appropriations Clause of the Constitution required disclosure of the CIA's expenses. *Id.* The Supreme Court rejected this claim. *Id.* at 179–80. Understandably so: the Appropriations Clause does not purport to create an individual right to information about government expenditures. *Id.* at 178 n.11. *Richardson* stands for nothing more than the proposition that litigation may not serve as a forum for resolving mere policy disputes. It offers no insight on a case, like this one, where a plaintiff alleges deprivation of the right to vote. "The fact that the Court in *Richardson* focused upon taxpayer standing, not voter standing, places that case at still a greater distance from the case before [this Court]." *Akins*, 524 U.S. at 22 (internal citations omitted).[3]

[3] Defendants also invoke *Gill v. Whitford*, 138 S.Ct. 1916 (2018). Defs.' Br. 9–10. In *Gill*, a partisan gerrymandering case, the Supreme Court held that a voter (1) who did not live in a gerrymandered district and (2) whose district would not be affected by a redrawn map, did not have standing to challenge the way districts were drawn across the state. 138 S.Ct. at 1933. In other words, the allegedly unlawful maps had no direct bearing on how the plaintiffs' votes would be weighted. It was for that reason that the Court concluded that the challengers "assert[ed] only a generalized

2. Defendants Challenge a "Reasonable Beliefs" Theory of Standing that Plaintiffs Do Not Assert

Several times in their brief, Defendants take aim at a strawman: the proposition that Plaintiffs' theory of standing depends on their "reasonable beliefs" about the risks associated with South Carolina's voting system. *See* Defs.' Br. 5–8, 14. But Plaintiffs have *never* claimed that their beliefs give rise to standing. To the contrary, Plaintiffs have repeatedly stated that their reasonable beliefs are *not* the grounds upon which they base their standing to sue. *See, e.g.*, JA668, Hearing Tr. (Jan. 15, 2019) ("The injury is not rooted in Plaintiffs' reasonable beliefs about the system. The injury is rooted in the objective vulnerabilities and susceptibility to failure inherent in that system"). Plaintiffs' actual basis for standing is that the unremedied vulnerabilities to hacking and machine failure, the inability to meaningfully audit voting machines, and the heightened threat environment currently facing South Carolina's voting sytem—all taken together—create a substantial risk that Plaintiffs' right to cast an effective ballot will be lost. JA55–56 ¶¶ 121–24.

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grievance against governmental conduct of which he or she does not approve." *Id.* at 1930 (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). To be analogous to *Gill*, this case would need to involve a similar disjunction between plaintiff and injury—for example, a challenge to South Carolina's voting system brought by North Carolina voters.

C. Defendants Incorrectly Assert that the Potential Role of "Third Party" Hackers Defeats Standing

Defendants claim that any impact on Plaintiffs' voting rights resulting from a cyberattack would be attributable to third-party hackers not before the Court, rather than the Defendants named in this action, depriving Plaintiffs of Article III standing. *See* Defs.' Br. 44–46, 49–51. This argument misstates the law and misses the point.

As Plaintiffs have alleged, the SEC is tasked with the sole legal responsibility to certify (and, when necessary, decertify) the voting system used in South Carolina elections. *See* JA55 ¶¶ 118–22 (citing S.C. Code §§ 7-13-1620, 1655). Although one of the flaws that Plaintiffs have alleged—the system's vulnerability to hacking—presumably requires third-party action for that hacking to occur, this does not change the simple fact that the failure to ensure a reliable election system is the result of Defendants' conduct. *See generally* Br. *Amici Curiae* of 13 Election Officials, ECF No. 26-1; *Cf. Curling II*, No. 1:17-cv-2989 (N.D. Ga. May 21, 2019), ECF No. 375 at 41 ("Rapidly evolving cybertechnology changes and challenges have altered the reality now facing electoral systems. . . ."). On Defendants' theory, a state election body could leave passwords entirely unprotected, or eliminate their use entirely, or have the system connected to the internet with no security measures whatsoever. Yet no matter how vulnerable the election system it maintains, or how egregiously remiss in its duties a state election body was, a voter would lack standing to state a claim, since the harm (the hacking) would always require the actions of a

third party. And in any event, the risk that Plaintiffs will be disenfranchised is the product of the *combined* risk of hacking and machine failure. *See* Opening Br. 8–9. Third parties have nothing to do with the latter element of that risk.

Defendants' theory conflicts with established law. As long as the challenged election-related conduct "is at least in part responsible" for the plaintiff's injury, the fairly traceable prong of Article III standing is satisfied, "notwithstanding the presence of another proximate cause." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 315–16 (4th Cir. 2013) (citation omitted). For example, the court in *N.C. State Conference of NAACP* found that plaintiffs had standing to sue the board of elections members where the state's election practice created a substantial risk that voters would be purged from the rolls *if and only if* their registrations were to face a challenge at the hands of third-party. 283 F. Supp. at 403–04. And the court in *Curling* rejected precisely the argument advanced here by Defendants. In particular, it rejected the argument "that any injury would be traced to illegal hacking into the DREs, not the use of the DREs themselves," holding that "[a]t the motion to dismiss stage, these allegations plausibly show causal connection, even if indirectly, between Defendants' continued use of unsecure DREs and the injury to Plaintiffs' constitutional rights." 334 F. Supp. 3d at 1317.

Finally, on redressability, Defendants argue that "even if the Court orders a new voting system be procured . . . it is still speculative that any order from the Court

would diminish the threat of hacking or the risk of voting machine malfunction." *See* Defs.' Br. 50. This is incorrect. The District Court could issue an order that required the Defendants to adopt a voting system that is more secure than the iVotronic, and that uses paper ballots. Such a court order would serve to provide a remedy for Plaintiffs' constitutional injury.[4]

II. Defendants Urge an Improper Standard for Evaluating the Allegations in the Complaint

A. Defendants Ask the Court to Ignore Key Allegations in the Complaint and Instead Credit Factual Assertions Outside the Complaint

Defendants have not contested the plausibility of Plaintiffs' detailed factual allegations, which depict the alarming deficiencies in the voting system that

[4] Defendants essentially conceded this point in the lower court. While the motion to dismiss was pending, they sought to have the case dismissed as moot based on the issuance of the SEC's recent Request for Proposals ("RFP"). They argued that the procurement of a voting system that "leaves a paper trail and will be implemented in time for the 2020 presidential primaries" and that does "not utilize the previously used voting machines referenced in Plaintiffs' complaint" would moot Plaintiffs' claims. *See* Defs.' Suppl. Mem. in Supp. of Defs.' Mot. Summ. J., No. 3:18-cv-01887-JMC, ECF No. 43 (Jan. 4, 2019) at 3–4. Their mootness argument was wrong, because simply initiating an RFP that *might* one day result in a new voting system could not meet the "stringent" mootness standard of making it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Pls.' Mem. in Response to Defs.' Supp. Mem., No. 3:18-cv-0188 7-JMC ECF No. 45 (Jan. 11, 2019) at 2 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). While merely issuing the RFP guaranteed no actual change, its elements mirrors Plaintiffs' prayer for relief. *See* JA57. In other words, the parties appear to agree that such changes would remedy Plaintiffs' injury if *actually implemented*, as a remedial order would require.

Defendants maintain. Instead, Defendants rely heavily on their own factual assertions, which are outside the four corners of the Complaint and therefore entirely improper at this stage. *See, e.g.*, *King v. Rubenstein*, 825 F.3d 206, 214 (4th Cir. 2016).

The Complaint explains in great detail the substantial risk posed by the iVotronic voting system. Multiple security researchers have successfully hacked the iVotronic machine, revealing flaws so severe that election security experts commissioned by the Ohio Secretary of State concluded that the iVotronic could not "guarantee a trustworthy election." JA26 ¶ 40. Researchers at Florida State University came to a similar conclusion, testing the iVotronic machines and finding that a skilled hacker could take "complete control" of one during an election. JA30–32 ¶¶ 54–56. In addition to this severe hacking risk, the iVotronic has a demonstrated record of machine malfunction. Among other things, the iVotronic system was used in a Florida election in which 18,000 votes were permanently lost. JA30 ¶ 54. And that risk grows more acute as the "dinosaur" that is South Carolina's voting system ages and replacement parts become scarce. JA33 ¶ 61, JA37 ¶ 72. Finally, these substantial risks of both malicious interference and machine failure are exacerbated by the Defendants' inability to conduct a real audit. As described in the Complaint, to provide a meaningful safeguard against hacking or failure, an audit process must, *inter alia*, provide a software-independent basis for confirming

that the tabulated results match the expression of voter intent recorded on ballots. JA42 ¶¶ 84–86. The process that Defendants refer to as an "audit" fails to do this, and instead merely checks that the various digital counts are consistent. JA43 ¶ 90. In contrast to a meaningful audit, the procedure used by Defendants is incapable of detecting or remediating lost or manipulated votes. *See* Opening Br. 10.

Defendants fail to refute the notion that these allegations, in combination, represent a substantial risk that Plaintiffs votes will go uncounted. For example, they offer two responses to the conclusions of the Ohio Secretary of State's "EVEREST" Report as detailed in the Complaint: first, that it "addresses only the security of the iVotronic voting machines as they stood in 2007," and second, that the purpose of the Report "was to assess the security of electronic voting systems used in Ohio." Defs.' Br. 24. Neither argument undermines the plausibility of Plaintiffs' injuries.

First, the fact that the EVEREST Report was published in 2007 bolsters, rather than diminishes, the plausibility of Plaintiffs' injuries. As alleged in the Complaint, the iVotronic system that in 2007 suffered from massive vulnerabilities was the same system deployed in South Carolina between 2004 and 2006. JA21 ¶ 23, JA30 ¶ 53. The Complaint acknowledges that the SEC has certified upgraded software since then. JA23 ¶ 31. But it goes on to allege in detail, that rather than the system's deficiencies having been remediated, new vulnerabilities were exposed as recently

as 2017, JA34 ¶¶ 63-65, and network security failures occurred as recently as 2016, JA37 ¶¶ 72-73. And indeed, the passage of time makes the existing risks more pronounced, for several reasons: wear and tear exacerbate the risk of machine failure or hacking, JA35–38 ¶¶ 67–68, 70–74, replacement parts become more difficult to obtain, JA36–37 ¶¶ 69, 72, and of course, the intensity of the hacking threat has increased substantially, JA44–54 ¶¶ 94–114. If Defendants are in possession of facts showing that the security of the iVotronic system has meaningfully improved since the findings published in 2007, they will have the opportunity to present those facts in due course. But merely pointing out the passage of time since security researchers exposed the deficiencies of their system does not advance their cause.

Second, noting that the EVEREST report was commissioned by Ohio's Secretary of State does nothing to diminish the plausibility of Plaintiffs' injury. As alleged in the Complaint, the EVEREST researchers in 2007 studied the same system that the SEC had certified in South Carolina in 2004. JA21 ¶ 23, JA30 ¶ 53.

Defendants also seek to cast doubt on whether South Carolina is in fact "being targeted" by foreign actors. *See* Defs.' Br. 20, 22–27. In doing so, they overlook detailed allegations that paperless DRE voting systems are especially susceptible to manipulation, and therefore "are at the highest risk for security flaws." JA51 ¶ 109. *See also* Opening Br. 10–11. One of only five states that continue to exclusively employ these vulnerable DRE systems, South Carolina is an obvious target for

attack. *Id*. As former CIA director James Woolsey put it, "If I were a bad guy from another country who wanted to disrupt the American system . . . I think I'd concentrate on messing up the touch screen voting systems." JA54 ¶ 114. *See also Curling II*, No. 1:17-cv-2989, ECF No. 375 at 43 ("[N]ational security experts and cybersecurity experts at the highest levels of our nation's government and institutions have weighed in on the specific issue of DRE systems in upcoming elections and found them to be highly vulnerable to interference, particularly in the absence of any paper ballot audit trail.")

Moreover, as alleged in the Complaint, South Carolina's vulnerability to such an attack is compounded by the state's history of serious problems related to both network and physical security during elections. *See* Opening Br. 7–8, 28–29. These kinds of vulnerabilities exacerbate the iVotronic system's inherent flaws. Lapses in physical security can make it even easier for an attacker to install malware on a voting machine without being detected, which can then propagate throughout the system. *See* Opening Br. 28. Similarly, security failures in the county-based Unity system for administering the election and tabulating results can lead to widespread alteration or loss of votes as malware travels from the county headquarters to the individual machines with which it interacts. *Id.* at 28–29.[5]

[5] Relying on extra-record evidence, Defendants claim that these network security risks are irrelevant because the iVotronic system is "not connected to phone or network lines." Defs.' Br. 25 n.7. As the Complaint makes clear, this argument is

Defendants rely on outside-the-complaint factual assertions to claim that the iVotronic voting system *can* in fact be audited and hacking detected. *See* Defs.' Br. 37 & n.13. But even if Defendants' extra-record factual assertions were properly before the Court, Defendants say nothing that casts doubt on Plaintiffs' allegations. As explained in detail in the Complaint, the "election audit" currently conducted by the SEC serves only to compare the vote totals recorded by one part of the system with those tallied by another part of the system. JA43 ¶ 89. Of course, if the system is compromised, such an audit would serve only to check the compromised system against itself, which is no audit at all. JA43 ¶ 90; *see also* Br. of Nat'l Sec. Prof'ls as *Amici Curiae* in Supp. of Neither Party, ECF No. 28-1 at 5, 16, 23–24.

Defendants also ignore allegations that illustrate the history of the iVotronic system malfunctioning in ways that disenfranchise voters. They assert that "there is no allegation that any voter was actually unable to vote or had their vote counted inaccurately without remediation." Defs.' Br. 36. But the Complaint alleges precisely that. In addition to describing a Florida election in which 18,000 votes were permanently lost, JA30 ¶ 54, it cites examples of South Carolina races in which

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specious. According to an April 27, 2018 report of the House Permanent Select Committee on Intelligence, "[t]he fact that voting machines themselves, as well as tabulation systems, are not directly connected to the internet does not offer adequate security. Rather, it can create a false sense of security." JA48 ¶ 104. And with respect to iVotronic system in particular, the Complaint describes in detail how an attack can be propagated virally through the system using fake or corrupted PEBs, even if the system is never connected to the Internet. Opening Br. 6–7.

the number of votes in the final tally was wildly inconsistent with the number of votes actually cast. JA35 ¶ 68, JA69 ¶ 10.

Finally, Defendants' reliance on the (outside-the-pleadings) RFP, *see* Defs.' Br. 27–28, is not just improper on review of a motion to dismiss, but also irrelevant on the substance (as discussed in Section II.B, *infra*) and misplaced under principles of mootness law. A defendant cannot unilaterally undermine a plaintiff's standing by representing to the court that the defendant is in the process of taking some action that may potentially eliminate the plaintiff's injury, with the possibility that the remedy may never occur. Such an approach would conflict with well-established mootness doctrine, which holds that "[a] case becomes moot only when it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012) (quoting *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000) (internal quotations omitted)) (emphasis added). As Defendants tacitly acknowledge, that is not the case here.[6]

[6] An RFP is just a first step, not a guarantee that *any* change will occur, much less a timely change that will be sufficient to cure Plaintiffs' injury. Highlighting the entirely conditional nature of the RFP, the website to which Defendants cite states only that it is the "goal" for the new system to be in place by the 2020 elections. *See South Carolina State Election Commission*, Voting System Replacement News and Information, *available at* https://www.scvotes.org/voting-system-replacement-news-and-information (last accessed May 27, 2019). This necessarily implies that Defendants' "goal" may not be achieved. Indeed, the record reflects just that outcome having occurred in the past. The 2004 RFP that led to acquisition of the current system was delayed due to vendor challenges, *see* JA488–89, and a 2016 RFP seeking proposals for an electronic voting system to replace the iVotronic was

Notably, the court in *Curling* recently denied the motion to dismiss despite the fact that the Georgia legislature had recently "approved funds for a new system of voting technology," noting that "[a]s the state has yet to choose which specific vendor's proposal will be selected and implemented, how the issue will play out in the context of new voting technology remains an open question." *Curling II*, No. 1:17-cv-2989, ECF No. 375 at 52 n.38.

Should Defendants eventually moot this case by adopting a new, constitutionally sufficient voting system through the RFP process, Plaintiffs would welcome that result. But at this stage, implementation of a new system is pure speculation. Such speculation has no bearing upon whether Plaintiffs have alleged facts sufficient to establish their standing to sue.

B. Defendants' Description of an "Attenuated Chain of Possibilities" Relies on the Wrong Legal Standard and Misstates Plaintiffs' Allegations

Relying on *Clapper*, Defendants contend that Plaintiffs' standing theory relies on a "highly attenuated chain of possibilities." Defs.' Br. 18–29. The links in this supposed chain are (i) that South Carolina is being targeted by hackers; (ii) that the current iVotronic system will be used in 2020; (iii) that the system will be

withdrawn entirely, *see* State Election Commission, Fiscal Year 2015-2016 Accountability Report at A-4-5, https://www.scstatehouse.gov/reports/aar2016/D500.pdf (last accessed May 27, 2019).

successfully breached by hackers; (iv) that the breach will result in the alteration or dilution of Plaintiffs' votes; and (v) that the breach will go undetected and unremediated by the SEC. Defs.' Br. 20.

Defendants' effort to approximate the chain of speculative possibilities identified in *Clapper* collapses under scrutiny. For reasons explained in Plaintiffs' opening brief, the analogy to *Clapper* is misplaced. *See* Opening Br. 32–34. Further, at least two of Defendants' supposed "possibilities" should, at the motion to dismiss stage, be presumed true. Most glaringly, Defendants' second supposed link in the chain—the suggestion that the continued use of the iVotronic system in 2020 is a mere "possibility"—turns the analysis on its head. Ignoring the well-pled allegation that iVotronic system is currently the only in-person voting system approved for use in the state, *see* JA21–23, Defendants seek to cast doubt on that by asserting untested extra-record facts, Defs.' Br. 21. That is not how motions to dismiss work. Similarly, Defendants' fifth supposed speculative link—that the breach will go undetected and unremediated by the SEC—is at this stage no question at all: Plaintiffs have alleged that the iVotronic system lacks a paper ballot or other independent record of votes cast, so once election results are altered within the voting system by a breach or malfunction, there is no way to recover records that reflect voters' actual ballots. JA43 ¶ 90. Defendants do not get to contest that well pled allegation with extra-record factual assertions. Moreover, with respect to link

(i), Plaintiffs have alleged that Defendants' maintenance of a paperless DRE machine places the state at a particularly elevated risk of attack, JA48–49 ¶ 104, JA51 ¶¶ 109–10, JA54 ¶ 114; and with respect to links (iii) and (iv), Plaintiffs have alleged that the iVotronic system is particularly vulnerable to the types of attack that could compromise an entire election, *see, e.g.*, JA26–29 ¶¶ 40–50, JA30 ¶ 52.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's ruling and remand the case for further proceedings.

May 28, 2019

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, the undersigned counsel for Plaintiffs-Appellants certifies that the accompanying brief is printed in a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief comprises 6,328 words according to the word count provided by Microsoft Word, excluding the parts of the document excepted by Fed. R. Civ. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on May 28, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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